SUPREME COURT, U.S.

74-783

DEC 23 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. A-429

DONALD DEMARRIAS,
Petitioner,

vs.

MARY POITRA, AS MOTHER AND SURVIVING PARENT OF RICHARD A. PRIMEAUX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PAUL M. SAND
First Assistant Attorney General
State Capitol
Bismarck, North Dakota 58505

JOHN M. OLSON
Special Assistant Attorney General
State Capitol
Bismarck, North Dakota 58505
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Table of Citations I

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 4

Conclusion 8

Appendix—

Opinion and Judgment, United States Court of Appeals for the Eighth Circuit A1

Decision and Opinion of the United States District Court A14

Table of Citations

CASES

Atkins v. *Schmutz Manufacturing Co.*, 435 F. 2d 527 (4th Cir. 1970) 4

Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) 4, 5, 6

Gourneau v. *Smith*, 207 NW 2d 256 4

Groundhog v. *Keeler*, 442 F. 2d 674 (10th Cir. 1971) 6

Hot Oil Service, Inc. v. *Hall*, 366 F. 2d 295 (9th Cir. 1966) 5, 6

Littell v. *Nakai*, 344 F. 2d 486 (9th Cir. 1965) 5, 6, 7

Prashar v. *Volkswagen of America, Inc.*, 480 F. 2d 947 (8th Cir. 1973) 4

Williams v. *Lee*, 358 U.S. 217 (1958) 6, 7
Worcester v. *Georgia*, 31 U.S. 515 (1832) 6

STATUTES

25 U.S.C. 1322 ..... 2-3, 5
28 U.S.C. 1332(a) 2, 4
N.D.C.C. 27-19-02 5

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. A-429

DONALD DEMARRIAS,
Petitioner,

vs.

MARY POITRA, AS MOTHER AND SURVIVING PARENT OF RICHARD A. PRIMEAUX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner Donald Demarrias respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 28, 1974.

OPINIONS BELOW

The decision and opinion of the District Court for the District of North Dakota, 369 F. Supp. 257 and the opinion of the Court of Appeals, 502 F.2d 23, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 28, 1974. An Order extending time to file petition for writ of certiorari was granted on November 22, 1974, and this petition is filed within the extended time provided. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether federal diversity jurisdiction can be invoked in the absence of jurisdiction by the state.

2. Whether a dispute involving Indians and arising within the boundaries of an Indian reservation is subject to the exclusive jurisdiction of the tribal court.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

> Section 1332(a)(1). *Diversity of Citizenship; amount in controversy; costs*
>
> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between - - -
>
> (1) Citizens of different states;

United States Code, Title 25:

> Section 1322(a). *Assumption by State of civil jurisdiction - - - consent of United States; force and effect of civil laws*

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction, such measure of jurisdiction over any or all such laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

STATEMENT OF THE CASE

As the result of a motor vehicle accident, the respondent has brought this action pursuant to the provisions of Chapter 32-21 of the North Dakota Century Code for the wrongful death of her son. The accident occurred on the Standing Rock Reservation near Selfridge, North Dakota. The respondent is a citizen of North Dakota and the petitioner is a citizen of South Dakota. Both are enrolled Indians residing within the exterior boundaries of the Standing Rock Reservation which extends into both states.

The North Dakota Unsatisfied Judgment Fund is defending this action on behalf of the petitioner who failed to make an appearance when a complaint was served. The Fund, pursuant to the provisions of N.D.C.C. Section 39-17-04, moved to dismiss the action for lack of subject-matter jurisdiction. On October 25, 1973, the district court

dismissed the action stating that it could not entertain a diversity action not maintainable in the state courts. The Court of Appeals reversed the decision of the district court and held that there was subject-matter jurisdiction under 28 U.S.C. 1332(a).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decisions of Another Court of Appeals in the Application of 28 U.S.C. 1332(a).

Section 1332(a) of Title 28 provides for diversity jurisdiction when the parties to the action are citizens of different states. While it is true that the parties in this action are citizens of different states, it is also a fact that both are enrolled Indians residing on the Standing Rock Reservation. Pursuant to *Gourneau* v. *Smith*, 207 NW 2d 256 (ND 1973), the North Dakota Supreme Court held that the state does not have jurisdiction in an action brought by an Indian against another Indian where the dispute arises within the exterior boundaries of an Indian Reservation. Citing *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), the Eighth Circuit acknowledged that the federal courts in diversity actions must give deference to state-created rights and obligations by state courts. Appendix, pp. A4-A5. However, based upon subsequent decisions, the lower court has departed from the *Erie* rule of restraining federal diversity jurisdiction in the absence of state jurisdiction. Instead an examination of state interest or policy will be made to determine accessibility to the federal courts. Appendix, p. A6, citing *Prashar* v. *Volkswagen of America, Inc.*, 480 F. 2d 947 (8th Cir. 1973) and *Atkins* v. *Schmutz Manufacturing Co.*, 435 F. 2d 527 (4th Cir. 1970). The Eighth Circuit thus held that since Sec-

tion 1322 of Title 25 is the basis for the absence of state court jurisdiction, this is not an adequate barrier to federal diversity jurisdiction. Therefore the court concluded that no policy or interest was at issue since "The reason that North Dakota lacks jurisdiction over this civil action is because of the special status given Indians under *federal* law, not because of any state policy consideration." Appendix, p. A8.

The propriety of this decision is thus questionable. If the weight of the *Erie* doctrine of preventing discrimination against citizens of the forum state remains a viable consideration, then the exercise of federal diversity jurisdiction in this instance appears to be an overt disregard of that principle. Certainly Indian citizens of North Dakota do not have the same right of accessibility to the courts. Can it then be stated that the existence of a federal law creates an additional forum for non-resident litigants? And although Section 1322 of Title 25 provides the basis for the absence of state court jurisdiction, Section 27-19-02 of the North Dakota Century Code provides the same restrictions, although such state law has arguably been superceded by the federal act.

The Ninth Circuit has held that federal diversity jurisdiction will not be invoked where the state courts do not have subject-matter jurisdiction. See *Hot Oil Service, Inc.* v. *Hall*, 366 F. 2d 295 (9th Cir. 1966), and *Littell* v. *Nakai*, 344 F. 2d 486 (9th Cir. 1965). It was held in both decisions that the federal courts operate as an adjunct to a state court in a diversity case. *Littell*, p. 489. It is not clear, therefore, that the Eighth Circuit's interpretation of the Ninth Circuit's decisions is accurate when it distinguishes *Littell* and *Hall* on the basis of non-interference with tribal self-government policies. Appendix, pp. A10-

A11. The lower court has thus evaded the apparent recognition of the *Erie* doctrine in *Littell* and *Hall*.

These conflicts justify the grant of certiorari to review the judgment below.

2. The Decision Below Raises Significant and Recurring Problems Concerning the Exclusive Jurisdiction of the Tribal Government.

The Eighth Circuit has held that the federal district court is vested with diversity jurisdiction and that this does not constitute an interference with tribal self-government. An early decision by this court formulated our national Indian policy. It was held in *Worcester* v. *Georgia*, 31 U.S. 515, 8 L. Ed. 483 (1832), that the Indian tribes were given a broad grant of control over their own affairs, a form of sovereign autonomy. As stated in *Groundhog* v. *Keeler*, 442 F. 2d 674 (10th Cir. 1971), at p. 678,

> The Indian nations or tribes are dependent political nations and wards of the United States. They possess the attributes of sovereignty, insofar as they have not been taken away by Congress. They are quasi-sovereign nations. The Constitution applies to Indian nations only to the extent it expressly binds them by treaty or Act of Congress.

The lower court negates any interference with the tribe in this action since one Indian seeks to recover from another Indian. Appendix, p. A11. However, the court equates that interference with "a dispute that involves considerations of policy regarding tribal lands or customs." Appendix, p. A11. Thus the Eighth Circuit's analysis is contrary to the definition of interference enunciated in *Williams* v. *Lee*, 358 U.S. 217 (1958), where this Court stated:

> There can be no doubt that to allow the exercise of jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of Indians to govern themselves. *Williams*, at p. 223.

Williams involved a non-reservation plaintiff who sued a Navajo Indian and his wife for a debt incurred on the Reservation. To what extent, therefore, can there be an interference with the tribal courts? If any federal assumption of jurisdiction over disputes which can be litigated by the tribal court constitutes interference, then the lower court has improvidently disrupted the tribal right of self-government.

The Eighth Circuit has undoubtedly narrowed the concept of "interference" to "tribal lands or customs", Appendix, p. A11. A conflict thus arises with the Ninth Circuit holding in *Littell* v. *Nakai*, supra. As stated therein, at p. 490,

> The Navajo Tribe as such need not have a proprietary or other legally recognized interest in the particular litigation or its outcome in order for the controversy to be one concerning internal affairs. To so conclude mistakes the nature of the Tribe's interest and ignores the holding in Williams v. Lee. . . . the test was a broader one hinging on whether the matter was one demanding the exercise of the Tribe's responsibilities of self-government.

Thus the extent of independence placed upon the Standing Rock Reservation needs to be determined. Since the tribal court has jurisdiction, can its authority and responsibilities be displaced by the exercise of federal diversity jurisdiction? The refusal of the Eighth Circuit to

recognize the autonomy of the tribal court and its power to litigate disputes concerning the Standing Rock people is open to serious question and cannot be justified.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

PAUL M. SAND
First Assistant Attorney General
State Capitol
Bismarck, North Dakota 58505

JOHN M. OLSON
Special Assistant Attorney General
State Capitol
Bismarck, North Dakota 58505

December 20, 1974.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 74-1025

Mary Poitra, as Mother and Surviving Parent of Richard A. Primeaux,
Appellant,

v.

Donald Demarrias,
Appellee.

Appeal from the United States District Court for the District of North Dakota.

Submitted: April 19, 1974
Filed: August 28, 1974

Before HEANEY and STEPHENSON, Circuit Judges, and TALBOT SMITH, Senior District Judge.*

STEPHENSON, Circuit Judge.

In this wrongful death action brought by one Indian against another Indian, the primary issue raised on appeal is whether diversity jurisdiction in the federal district court pursuant to 28 *U.S.C.* §1332(a) (1970) is precluded by reason of the absence of subject-matter jurisdiction in

---

*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

the courts of the State of North Dakota over civil causes of action arising in Indian country. *Gourneau* v. *Smith*, 207 N.W.2d 256 (N.D. 1973).[1]

Plaintiff-appellant and defendant-appellee are both enrolled Indians residing within the exterior boundaries of the Standing Rock Sioux Indian Reservation. Appellant, a citizen of North Dakota, brought this action against appellee, a citizen of South Dakota, pursuant to the provisions of Chapter 32-21 of the *North Dakota Century Code* for the wrongful death of her minor son. Appellant's son, Richard A. Primeaux, died from injuries sustained in an automobile accident which occurred on the Standing Rock Reservation, near Selfridge, North Dakota. The automobile in which Primeaux was a passenger was struck from the rear by an automobile driven by appellee.

Appellant filed her complaint on June 15, 1972. Service was made upon the defendant by serving the North Dakota State Highway Commissioner on June 16, 1972, pursuant to the provisions of the North Dakota non-resident motorist statute *N.D.C.C.* §39-01-11. No responsive pleading was filed, and on August 22, 1973, appellant filed a notice of application for default judgment which was served on the North Dakota Unsatisfied Judgment Fund pursuant to *N.D.C.C.* §39-17-03 (1972). On September 11, 1973, a Special Assistant Attorney General for North Dakota, representing the Fund,[2] moved on behalf of appellee

---

1. *See* 25 *U.S.C.* §1322(a) (1970); *North Dakota Century Code* §27-19-01, *et seq.* (1974).

2. *N.D.C.C.* §39-17-04 (1972) reads:

> * * * the attorney general may enter an appearance, file a defense, appear by counsel at the trial or take such other action as he may deem appropriate on behalf and in the name of the defendant, and may thereupon, on behalf and in the name of the defendant, conduct his defense, and all acts done in accordance therewith shall be deemed to be acts of the defendant. * * *

to dismiss the action for lack of subject-matter jurisdiction.

On October 27, 1973, the district court dismissed the action. *Poitra* v. *Demarrias*, 369 F. Supp. 257 (D.N.D. 1973). In its memorandum and order it stated that in a diversity action it could not "entertain any action not maintainable in a North Dakota Court." *Id.* at 258 *citing* *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938). The district court further stated that:

> In *Guaranty Trust Co. of N.Y.* v. *York*, 326 U.S. 99, 108-109, 65 S. Ct. 1464, 1469, 89 L.Ed. 2079, the Supreme Court said:
>
> "* * * But since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another Court of the State, it cannot afford recovery if the right to recover is made unavailable by the State * * *."
>
> In this case, a Federal Court, by reason of diversity of citizenship and amount in controversy, is asked to adjudicate a right created by the State. The plaintiff's exercise of that right is subject to the laws of North Dakota as interpreted by the Courts of North Dakota.
>
> By its decision in *Gourneau* v. *Smith*, 207 N.W.2d 256, the North Dakota Supreme Court conclusively and effectively closed the State Courthouse door to the plaintiff in this case. *Id.*

We reverse that determination. As noted by the Supreme Court in *Hanna* v. *Plumer*, 380 U.S. 460, 466-68, 85 S. Ct. 1136 (1965), the *Erie* rule is based in part upon "a realization that it would be unfair for the character or re-

sult of a litigation materially to differ because suit had been brought in a federal court" rather than in state court, and that it is "also in part a reaction to the practice of 'forum shopping' which had grown up in response to the rule of *Swift* v. *Tyson*."[3] The Court then characterized the twin aims of *Erie* as: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 468.

Clearly, *Hanna* established a subtle retreat from prior decisions which had led to an overconcern with conformity to state law in diversity actions. *Compare Hanna* v. *Plumer, supra, with Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221 (1949); *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 69 S. Ct. 1235 (1949); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S. Ct. 1233 (1949); *Angel* v. *Bullington*, 330 U.S. 183, 67 S. Ct. 657 (1947);[4] *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 65 S. Ct. 1464 (1945).

Erie, of course, teaches that federal courts in diversity actions must give deference to the "definition of state-

---

3. 41 U.S. (16 Pet.) 1 (1842). In *Hanna* v. *Plumer, supra* at 468 n.9, the Court stated:

> *Erie* and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause plaintiff to choose the federal court.

4. One author has indicated that the *Woods* and *Angel* decisions could be explained as holding "that since the state had closed its courts to a certain type of action, the federal court out of respect for the state's policy would likewise refuse to entertain that type of case, even though it had undoubted jurisdiction." *Meador, State Law and the Federal Judicial Power*, 49 *Va. L. Rev.* 1082, 1098 (1963).

created rights and obligations by the state courts," whether substantive, procedural or quasi-procedural where the state rule of law is "bound up" with a state-created right or obligation. *Byrd* v. *Blue Ridge Elec. Co-op*, 356 U.S. 525, 535-36, 78 S. Ct. 893 (1958). The thrust of *Erie*, however, cannot be interpreted to allow in every instance the diversity jurisdiction of federal courts to be wholly controlled and dependent upon state law. As this court recently pointed out in *Prashar* v. *Volkswagen of America, Inc.*, 480 F.2d 947, 952-53 (8th Cir. 1973), the primary concerns in *Erie* were with providing equal protection to citizen-defendants and with "the vital recognition of the necessary bridling of encroaching federalism in areas of *state policy*." (Emphasis added.) In addition, we noted that "federal diversity actions can never be identic to those carried out in state form," and concluded that no state policy would be violated by application of a federal procedure that differed from the state rule. *Id.*

Similar views were expressed by the Fourth Circuit in a case in which that court grappled with the *Erie* problem. In *Atkins* v. *Schmutz Manufacturing Co.*, 435 F.2d 527, 536 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971), the court stated:

> * * * *Erie* and its progeny may be seen as an attempt to formulate a workable doctrine governing choice of law in diversity actions which would prevent impermissible federal court interference with state rules reflecting policy considerations lying within the realm of state lawmaking competence. * * *
>
> * * *
>
> It is, of course, neither possible nor necessary for federal courts to be totally neutral in the adjudication of state-created rights. * * * Some adoption of state court procedures by federal courts sitting in di-

> versity may be feasible, but it may also be in conflict with the fundamental interests of the federal courts in the conduct of their own business and maintenance of the integrity of their own procedures, *the legitimate interests of a federal forum, qua forum.* (Emphasis added.)

The *Prashar* and *Atkins* decisions indicate that the scope of the *Erie* doctrine has been narrowed significantly since its earliest applications. It now seems clear that a federal court sitting in diversity need not mirror in every regard the state courts. The interest of the federal court in its own procedures and policies dominates in the absence of identifiable state interests which are inextricably linked with the underlying substantive right.

Furthermore, it is also clear that federal courts have an affirmative responsibility to guard their own jurisdiction. This point has been made primarily in the context of attempts by states to proscribe accessibility to the courts of those states to a particular class of litigants with respect to state-created substantive rights. Such efforts cannot *a priori* limit the jurisdiction of the federal courts. *See Davis* v. *Ensign-Bickford Co.*, 139 F.2d 624, 626 (8th Cir. 1944); *Stephenson* v. *Grand Trunk Western R.R.*, 110 F.2d 401 (7th Cir. 1940); *State of Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391, 395-96 (S.D. Iowa 1968); *Monroe* v. *Pape*, 221 F. Supp. 635, 649 & n.39 (N.D. Ill. 1963); *Martineau* v. *Eastern Airlines*, 64 F. Supp. 235 (N.D. Ill. 1946).

As explained by the Fourth Circuit in *Markham* v. *City of Newport News*, 292 F.2d 711, 713-16 (4th Cir. 1961):

> In determining its own jurisdiction, a District Court of the United States must look to the sources of its

> power and not to acts of states which have no power to enlarge or to contract the federal jurisdiction.
>
> * * *
>
> However extensive the power of the state to deal with the substantive right, it has no power to defeat the jurisdiction of the federal courts.
>
> * * *
>
> * * * [A] court, in determining its own jurisdiction, must look to the constitution and laws of the sovereignty which created it. The laws of a state cannot enlarge or restrict the jurisdiction of the federal courts or those of any other state. It necessarily follows that whenever a state provides a substantive right and a remedy for its enforcement in a judicial proceeding in any state court, a judicial controversy involving the right may be adjudicated by a United States District Court if it has jurisdiction under the Constitution and laws of the United States.

This language lends strong support to the precept that federal courts have an obligation to exercise jurisdiction when the statutory requisites are satisfied. *See First National Bank* v. *United Airlines*, 342 U.S. 396, 399-400 (1952). *Cf. Schantz* v. *White Lightning*, ... F.2d ..... (8th Cir. filed this date).

Against this background we turn to the problem. State assumption of civil jurisdiction over Indians is the subject matter of 25 *U.S.C.* §1322(a) (1970).[5] It states,

---

5. The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected

(Continued on following page)

in effect, that until an Indian reservation consents to the jurisdiction of the state courts, such jurisdiction may not be assumed by the state courts of any cause of action involving Indians and arising within the boundaries of the Indian reservation. Although the state courts of North Dakota are open to Indians, the Standing Rock Reservation has not consented to jurisdiction in the manner prescribed under §1322(a). Thus, no policy of the State of North Dakota is at issue in this case.[6] Rather, it is the Indians themselves who, by deciding not to consent to state jurisdiction, have created the federal jurisdictional problem we face in this case. As in *Prashar, supra,* and *Atkins, supra,* we can find no significant state interest that would prevent the federal court from exercising its jurisdiction in order to hear an action, such as this, founded upon a state-created substantive right. The reason that North Dakota lacks jurisdiction over this civil action is because of the special status given Indians under *federal* law, not because of any *state* policy consideration. *See Williams* v. *Lee*, 358 U.S. 217 (1959); *Gourneau* v. *Smith*, 207 N.W.2d 256 (N.D. 1973).

Furthermore, we note from the legislative history of the "consent" statute that §1322(a) was certainly not intended to deprive Indians of state-created substantive

---

Footnote Continued—

> by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

6. Prior to enactment of 25 *U.S.C.* §1322(a) the North Dakota Supreme Court held that the state court had jurisdiction of an action arising out of circumstances almost identical to those at bar. *Vermillion* v. *Spotted Elk*, 85 N.W.2d 432 (N.D. 1957).

rights. On the contrary, a number of the enacted tribal codes of justice provide that the tribal court with jurisdiction of a dispute will simply apply the law of the forum in which the court sits.[7] In effect, by the enactment of §1322(a), Congress recognized that in keeping with the semi-autonomous status of the Indian tribe relative to its relationship with state government,[8] the tribe has an interest in preventing the state from interfering with reservation affairs by unilaterally applying state law to all tribal members without tribal consent.[9] Such action would

---

7. *See Canby, Civil Jurisdiction and the Indian Reservation*, 1973 *Utah L. Rev.* 206, 217 n.83. For example, *The Code of Justice of the Standing Rock Sioux Tribe* (July 1973) states at §2.1:

> Civil matters shall be governed by the laws, customs and usages of the Tribe not prohibited by the laws of the United States, applicable Federal law and applicable regulations and decisions of the Department of the Interior. The laws of the state where the reservation is located may be employed as a guide * * *. Where appropriate, the laws of the state where the reservation is located may be employed to determine civil matters.

8. *See discussion* in *McClanahan* v. *State Tax Commission*, 411 U.S. 164, 168-73, 93 S. Ct. 1257 (1973).

9. *See Canby*, 1973 *Utah L. Rev.*, *supra* at 219. *See* 113 *Cong. Rec.* 35,474 (1967) (remarks of Senator Ervin):

> Title III repeals December 7 Public Law 83-280, which permits States to assume criminal and civil jurisdiction over Indian tribes regardless of the wishes of the tribe.
>
> In 1953, Public Law 83-280 (67 Stat. 588) conferred to certain States civil and criminal jurisdiction over Indian country. Tribes have been critical of Public Law 83-280 because it authorizes the unilateral application of State law to all tribes without their consent and regardless of their needs or special circumstances. Moreover, it appears that tribal laws were unnecessarily preempted and, as a consequence, tribal communities could not be governed effectively.
>
> The Subcommittee on Constitutional Rights in its "Summary Report of Hearings and Investigations of the Constitutional Rights of the American Indian" arrived at the following conclusion concerning legislation to remedy Public Law 83-280:

(Continued on following page)

naturally infringe upon the right of the tribe to govern itself free from state interference respecting those matters arising within the boundaries of the reservation. This latter consideration was the tribal communities' major criticism of the repealed predecessor to §1322(a), Pub. L. No. 83-280, 67 Stat. 588 (1953), *see* note 7, *supra*, which did not require consent of the tribe as a predicate to state assumption of jurisdiction.

We are mindful of the Ninth Circuit's decisions of *Hot Oil Service, Inc.* v. *Hall*, 366 F.2d 295 (9th Cir. 1966), and *Littell* v. *Nakai*, 344 F.2d 486 (9th Cir. 1965), both of which held that the federal district court could not assume diversity jurisdiction in disputes arising on the Navajo Indian Reservation unless the state courts also had subject-matter jurisdiction, *citing Woods* v. *Interstate Realty Co.*, *supra*, 337 U.S. 535, 69 S. Ct. 1235 (1949). Both of these cases can be distinguished. They were based on the concept of non-interference with tribal affairs that developed

---

Footnote Continued—

> Indian governments do not, of course, bear full responsibility for those denials of rights which have occurred or which in the future may occur. It appears, paradoxically, that the States have also erred, both by failing to prosecute offenses and by assuming civil and criminal jurisdiction when that assumption was clearly against the wishes of the Indian peoples affected. Concurrent jurisdiction by the United States in the first instance and a repeal of Public Law 280 or at least its modification to include tribal consent as a precondition of the State's assumption of jurisdiction, would seem to provide a suitable remedy.
>
> Under this title, any State desiring to assume civil and criminal jurisdiction over an Indian tribe must obtain the consent of the affected tribe. The repeal of Public Law 280 has been a major goal of all Indian tribes since the enactment of this hasty legislation—legislation which prevented Indans from having any voice in how or by whom they were to be governed.

See also S. Ervin, Protecting the Rights of the American Indian, S. Rep. No. 841, 90th Cong., 1st Sess. (1967).

out of the Supreme Court's opinion in *Williams* v. *Lee*, 358 U.S. 217 (1959). However, in neither case was the court faced with the application of a state-created right under which an individual Indian sought to recover from another Indian. In *Hot Oil*, the claim involved a lease agreement concerning facilities built on tribal land and subleased by a member of the tribe to a non-Indian. 366 F.2d at 296-97. In *Littell*, the plaintiff's complaint was based on a charge that the tribal chairman had tortiously interfered with the performance of a contract that the non-Indian plaintiff had made with the tribe. 344 F.2d at 487. In both instances, the non-interference and tribal self-government policies from *Williams* are obviously in issue, and the refusal by the courts to accept jurisdiction seems correct under those facts.

In the instant case, however, the facts are very different. Here, one Indian seeks to avail herself of the federal court in an action against another Indian. This fact in itself would seem to negate any interference claim that could be made since no interfering outsiders are trying to foist jurisdiction on the Indians. In addition, the underlying cause of action here is based on a *state-created* wrongful death statute and judgment fund, not a dispute that involves considerations of policy regarding tribal lands or customs. Since we can discern no possible interference with tribal or reservation self-government here, there is no reason why *Hot Oil* or *Littell* should control this case.[10]

---

10. Inasmuch as the Standing Rock Sioux Tribe has indicated in its tribal code that a state license and registration are necessary prerequisites for driving on the reservation, *The Code of Justice of the Standing Rock Sioux Tribe* §§8.1, 8.3 (July 1973), a persuasive argument can be made that the tribe has waived any "interference" claims with regard to suits in which the Unsatisfied Judgment Fund is involved. This is supported

(Continued on following page)

Where, as in the case before us, the statutory basis for federal jurisdiction exists[11] and the substantive right being asserted has been created by the state,[12] a federal statute precluding state court jurisdiction in civil matters unless tribal consent is given does not close the federal courthouse doors to these litigants. In *Littell*, the court indicates that "federal court jurisdiction would be equally disruptive of the policy [of tribal self-government] as would state court jurisdiction." We disagree and emphasize that the purpose of repealing Pub. L. No. 83-280, *supra*, and enacting §1322(a) was to prevent unwanted and unnecessary encroachment upon Indian tribes *by the states*.[13] We fail to conceive of any Congressional or judicial policy limitations requiring the federal court to refuse adjudication of this or similar claims when its jurisdiction is properly invoked. *Cf. Markham* v. *City of Newport News*, *supra*, 292 F.2d 711 (4th Cir. 1961). We would do a disservice to Indian citizens and to the legislators who passed the Indian Bill of Rights if we construed that right-granting legislation as giving Indians *less* than a full measure of federal rights and remedial avenues.

Footnote Continued—

by the fact that each driver in North Dakota contributes, through his or her annual car registration fee, one dollar to the fund. *North Dakota Century Code* §39-17-01 (1972). Furthermore, by acquiescing to the state regulations in this manner, the tribe may have left such fund cases to the "residuary" jurisdiction of the state. *See State ex rel. Iron Bear* v. *District Court*, 512 P.2d 1292, 1298 (Mont. 1973).

11. 28 *U.S.C.* §1332(a) (1970). Both the $10,000 jurisdictional amount and diversity of citizenship are present.

12. Chapter 32-21 of the *North Dakota Century Code*, *supra*.

13. *See* legislative history, note 9, *supra*. *See also McClanahan* v. *State Tax Commission*, *supra*, 411 U.S. 164, 93 S. Ct. 1257 (1973).

In the final analysis, we hold that in the context of this case the federal district court is vested with subject-matter jurisdiction under 28 *U.S.C.* §1332(a) (1970). The order of dismissal of the district court is reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

CIVIL NO. 1167

Mary Poitra, as mother and surving parent of
Richard A. Primeaux,
Plaintiff,

vs.

Donald Demarrias,
Defendant.

MEMORANDUM AND ORDER

(Filed November 2, 1973)

In this action, brought under the provisions of Chapter 32-21, NDCC (Death by Wrongful Act), plaintiff seeks to recover damages occasioned by the death of her son.

Jurisdiction is predicated on diversity of citizenship, it being alleged that the plaintiff is a citizen of North Dakota, the defendant is a citizen of South Dakota, and the amount in controversy exceeds the sum of $10,000.00. It is uncontroverted that both parties are enrolled Indians residing on the Standing Rock Sioux Indian Reservation and that that the accident giving rise to the alleged cause of action occurred within the exterior boundaries of that Reservation, near Selfridge, North Dakota.

The action was commenced by filing the complaint on June 15, 1972. Service was made upon the North Dakota State Highway Commissioner on June 16, 1972, in accordance with applicable North Dakota law. However, no responsive pleading was made, and on August 22, 1973, plaintiff filed its notice of application for default judg-

ment. The defendant, acting by and through his attorney, John M. Olson, Special Assistant Attorney General for the North Dakota Unsatisfied Judgment Fund, responded on September 11, 1973, by filing a motion to dismiss the action for reason that this Court lacks subject matter jurisdiction. Plaintiff filed a brief in opposition to the motion to dismiss and requested oral argument. The matter was heard on October 3, 1973, and is now ready for determination.

The defendant concedes that the jurisdictional facts pleaded satisfy the diversity of citizenship requisites of 28 USCA 1332. However, in this particular case we have a situation where the plaintiff, a citizen of North Dakota, is an enrolled Indian residing in Fort Yates, within the confines of the Standing Rock Sioux Indian Reservation; the defendant, a citizen of South Dakota, is an enrolled Indian residing in Little Eagle, within the boundaries of the same Reservation; and the accident giving rise to the alleged cause of action occurred near Selfridge, North Dakota, also within the boundaries of the Standing Rock Reservation.

In a diversity action, this Court sits as another North Dakota Court; we cannot entertain any action not maintainable in a North Dakota Court. *Erie* v. *Tompkins*, 304 U.S. 64. Also see: Wright, Federal Courts, Sec. 46, p. 152.

In *Guaranty Trust Co. of N.Y.* v. *York*, 326 U.S. 99, 108-109, the Supreme Court said:

> "- - - But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another Court of the State, it cannot afford recovery if the right to recover is made unavailable by the State - - -."

In this case, a Federal Court, by reason of diversity of citizenship and amount in controversy, is asked to adjudicate a right created by the State. The plaintiff's exercise of that right is subject to the laws of North Dakota as interpreted by the Courts of North Dakota.

By its decision in *Gourneau* v. *Smith*, 207 N.W.2d 256, the North Dakota Supreme Court conclusively and effectively closed the State Courthouse door to the plaintiff in this case. In *Gourneau*, the Court held that:

> "The courts of this State are not at liberty to exercise jurisdiction over civil actions against an Indian where the cause of action arises on the reservation." (207 N.W.2d 259)

The reasoning behind this holding was that, since existing procedures were available whereby Indians could consent to State Court jurisdiction, and such consent had not been given, federal law precluded State Court jurisdiction.

It having been decided by the Supreme Court of North Dakota that the right asserted by the Plaintiff in this case is not maintainable in a State Court, and this Federal Court being bound by the principles enunciated above, I find we are without subject matter jurisdiction.

Now, therefore, the Court having considered the pending motion to dismiss, together with briefs and oral argument, and being fully advised in all the premises;

IT IS ORDERED, That said motion to dismiss be, and the same is, in all things, *granted*, and the within action and complaint are hereby dismissed.

Dated at Minot, North Dakota, this 25th day of October, 1973.

By the Court:

/s/ Bruce M. Van Sickle, Judge
United States District Court